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# In the Supreme Court of the United States

OCTOBER TERM, 1980

REFRIGERATED TRANSPORT CO., INC., ET AL.,
PETITIONERS

*v.*

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION

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### QUESTIONS PRESENTED

1. Whether regulations promulgated by the Interstate Commerce Commission regarding interest to be paid on "escrow" funds held by regulated motor carriers exceeded the Commission's statutory authority.

2. Whether the Commission's selection of an appropriate interest rate was arbitrary and capricious.

3. Whether petitioners were given adequate notice and opportunity to be heard concerning the interest-on-escrow regulation.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 627 F.2d 546. The interim decision of the Interstate Commerce Commission is reported at 129 M.C.C. 700 (1978). The Commission's final decision is reported at 131 M.C.C. 141 (1979).

## JURISDICTION

The judgment of the court of appeals was entered on July 2, 1980. The petition for a writ of certiorari was filed on September 30, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTES INVOLVED

The "national transportation policy," 49 U.S.C. (Supp. II) 10101, provides in pertinent part:

> (a) To ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, * * * it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and in regulating those modes—
>
> * * * * *
>
> (2) to promote safe, adequate, economical, and efficient transportation;
>
> (3) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;
>
> * * * * *
>
> (6) to encourage fair wages and working conditions in the transportation industry.
>
> (b) This subtitle shall be administered and enforced to carry out the policy of this section.

49 U.S.C. (Supp. II) 10321(a) provides:

> The Interstate Commerce Commission shall carry out this subtitle. Enumeration of a power of the Commission in this subtitle does not exclude another power the Commission may have in carrying out this subtitle. The Commission may prescribe regulations in carrying out this subtitle.

## STATEMENT

Under the Interstate Commerce Act, 49 U.S.C. (Supp. II) 10101 *et seq.*,[1] a carrier must receive a license from the Interstate Commerce Commission before engaging in most forms of interstate motor transportation for hire. 49 U.S.C. (Supp. II) 10921. Many truckers who own and operate one or two trucks for hire, however, do not seek their own interstate operating authority because of the small size of their operations; they lease their equipment and services to a regulated carrier, transporting cargo in interstate commerce under the regulated carrier's operating authority and aegis (see Pet. App. A3–A4).

In 1973 the Nation's independent (owner-operated) truckers shut down operations to protest a host of economic problems with which they were beset. The strike precipitated hearings by both Congress and the Commission on the plight of the independent truckers (Pet. App. A3–A4). The hearings disclosed that independent truckers had trouble earning a profit under their leases. They were found to be "caught in a continuing cost crunch," faced with rising costs and inflexible income. H.R. Rep. No. 95–1812, 95th Cong., 2d Sess. 5–7 (1978). In addition, many truck leases required the independent trucker to deposit funds in es-

[1] Citations to the Interstate Commerce Act will be to subtitle IV of Title 49, United States Code, as recodified and reenacted by Congress in 1978. Pub. L. No. 95–473, 92 Stat. 1337.

crow with the regulated carrier, usually $500 or $1,000, to ensure performance and to cover repair expenses, license and permit costs, and claims that might arise out of the carriage of the goods. H.R. Rep. No. 95-1812, *supra*, at 11. These funds were often held for several months (Pet. App. A4). Only 23% of the regulated carriers who included escrow provisions in their leases paid interest on the escrowed funds. *Lease and Interchange of Vehicles*, 129 M.C.C. 700, 727 (1978) (*Interim Decision*).

As a result of the various hearings, the Commission commenced a rulemaking proceeding to consider modifying its leasing rules (Pet. App. A5). The notice of proposed rulemaking stated that one issue to be considered was the payment of interest on escrow funds. 42 Fed. Reg. 59984-59985 (1977). A number of regulated carriers, including petitioners, submitted comments arguing that the Commission lacked the statutory authority to promulgate the regulations. *Interim Decision*, *supra*, 129 M.C.C. at 702.

The Commission promulgated an interim decision proposing specific regulations to alleviate the independent truckers' problems. The Commission proposed, *inter alia*, that regulated carriers pay interest on the funds held in escrow at rates comparable to those paid by commercial banks operating in the regulated carrier's domicile. It also proposed that escrow deposits be returned within 45 days after termination of the leasing arrangement. *Interim Decision*, *supra*, 129 M.C.C. at 725-727. Addressing the comments that challenged its authority, the Commission, relying on *American Trucking Ass'ns, Inc.* v. *United States*, 344 U.S. 298 (1953), found that the proposed regulations were within its broad powers to regulate matters reasonably necessary to accomplish the purposes of the Interstate Commerce Act. It reasoned that the regulations would promote a smoothly functioning transpor-

tation system by reducing the possibility of disruptions in transportation services that could result if independent truckers suffered cash flow problems because of the existing escrow fund practices. *Interim Decision*, *supra*, 129 M.C.C. at 702–707.

After announcing its proposed rules, the Commission invited further public comments. In January 1979, the agency issued its final decision, essentially adopting its interim rules with minor modifications. *Lease and Interchange of Vehicles*, 131 M.C.C. 141 (1979) (*Final Decision*). The Commission made two modifications to the interim interest-on-escrow regulation.[2] First, it established that interest payments on the es-

[2]The Commission's final rule governing escrow funds provides in pertinent part (49 C.F.R. 1057.12(*l*)):

> (*l*) Escrow funds.—If escrow funds are required, the lease shall specify:
>
> * * * * *
>
> (5) That while the escrow fund is under the control of the carrier, the carrier shall pay interest on the escrow fund on at least a quarterly basis. For purposes of calculating the balance of the escrow fund on which interest must be paid, the carrier may deduct a sum equal to the average advance made to the individual lessor during the period of time for which interest is paid. The interest rate shall be established on the date the interest period begins and shall be at least equal to the average yield or equivalent coupon issue yield on 91-day, 13-week Treasury bills as established in the weekly auction by the Department of Treasury.
>
> (6) The conditions the lessor must fulfill in order to have the escrow fund returned. At the time of the return of the escrow fund, the authorized carrier may deduct monies for those obligations incurred by the lessor which have been previously specified in the lease, and shall provide a final accounting to the lessor or [sic] all such final deductions made to the escrow fund. The lease shall further specify that in no event shall the escrow fund be returned later than 45 days from the date of termination.

crow funds be made at a rate "at least equal to the average yield * * * on 91-day, 13-week Treasury bills" so as to eliminate the " 'definitional' problems" of determining commercial bank interest rates and a regulated carrier's place of domicile. Second, the Commission exempted from the interest-on-escrow rule those monies that regulated carriers use to make interest-free cash advances to independent operators. *Final Decision*, *supra*, 131 M.C.C. at 153–154.

Petitioners did not petition the Commission to reconsider or modify its final interest-on-escrow rule. The rules became effective in March 1979, and petitioners sought judicial review challenging the lawfulness of the interest-on-escrow provision primarily on the theory that the Commission lacked statutory authority and a rational basis for promulgating that regulation.[3]

The court of appeals upheld the interest-on-escrow rule (Pet. App. A1–A16). The court found that the interest-on-escrow provision was designed to foster the economic viability of the independent trucker, whose financial problems threaten the health and stability of the trucking industry as a whole. Because the regulation was intended to maintain a sound transportation system, the court concluded that it was designed to achieve the purposes of the Act and that the Commission possessed the authority to promulgate it under *American Trucking Ass'ns* v. *United States*, *supra* (Pet. App. A10–A11). The court also found that

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[3] In a separate appeal (*Global Van Lines* v. *ICC and United States*, No. 79–1185 (D.C. Cir.)), several other regulated carriers petitioned the court of appeals to set aside the Commission's rule that regulated carriers must return all escrow funds within 45 days after the lease terminates. That case was consolidated with the instant case. The court of appeals upheld the 45-day refund rule (Pet. App. A12–A14). No petition for certiorari has been filed in the *Global Van Lines* case.

the Commission's rule was rational, noting that petitioners did not seriously disagree with the need for the interest requirement although they did object to the particular rate selected (*id.* at A14). Finally, the court upheld the Commission's use of the Treasury bill rate as a reasonable exercise of the agency's discretion, balancing the benefit of having an easily determinable uniform rate of interest against the burden on the regulated carriers of paying that rate (*id.* at A16).

## ARGUMENT

1. Petitioners contend (Pet. 4–9) that the Commission exceeded its statutory authority in promulgating the interest-on-escrow rule. This contention is without merit. The court of appeals correctly held that the Commission acted within its authority under *American Trucking Ass'ns* v. *United States*, *supra*.

In *American Trucking*, this Court rejected a challenge to the Commission's authority to promulgate regulations concerning the duration of leases between regulated carriers and independent truckers. The Court noted the absence of express authority in the Act to regulate leasing practices but found that Congress' grant of general rulemaking authority under Section 204(a)(6) of the Act (now recodified at 49 U.S.C. (Supp. II) 10321(a)) authorized the leasing regulations. Because the challenged rules were designed to promote the "maintenance of sound transportation services" and thus to prevent conditions that could "frustrate the success of the regulation undertaken by Congress," the Commission's action necessarily fell within its rulemaking power. 344 U.S. at 310–311.

Similarly, as the court of appeals noted (Pet. App. A11), the Commission's regulations in this case are aimed at maintenance of sound transportation services. The rules prohibit the unremunerated use of in-

dependent truckers' funds as one of a number of measures aimed at halting the deterioration of the independents' finances. The Commission reasonably concluded that a threat to the independent truckers' economic viability creates a threat to the trucking industry as a whole and therefore that the regulations further the national transportation policy of maintaining a smoothly functioning transportation system. *Interim Decision*, *supra*, 129 M.C.C. at 706–707. See 49 U.S.C. (Supp. II) 10101. The Nation's independent truckers account for up to 40% of all intercity truck freight movement in the United States (Pet. App. A11). Clearly, regulations intended to preserve the independents' financial stability are designed to further the overall purpose of the Act, and their issuance is within the Commission's rulemaking authority. *American Trucking Ass'ns* v. *United States*, *supra*; *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973).

Petitioners suggest (Pet. 6–9) that the Commission's regulatory authority over truck leasing was limited by Congress in 1956, after this Court's decision in *American Trucking*, by the enactment of 49 U.S.C. (Supp. II) 11101 and 11107 (see Pet. App. C35–C36).[4] Section 11101(c), however, merely clarified Congress' intent that carriers of agricultural products that are otherwise exempted from the operation of the Act are also exempted from the regulations governing leasing. This section has no application here because petitioners are regulated carriers.

Section 11107 enacted several of the Commission's regulations that were upheld in *American Trucking*, including the requirement that leases be in writing.

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[4]The subsection reproduced under (d) at Pet. App. C36 is not, as it appears there, part of 49 U.S.C. (Supp. II) 11101; it is 49 U.S.C. (Supp. II) 10707(d).

Nothing in Section 11107 suggests that the Commission's authority over leasing is limited by that section. Indeed, that narrow construction is completely inconsistent with 49 U.S.C. (Supp. II) 10321(a), which provides: "Enumeration of a power of the Commission in this subtitle does not exclude another power the Commission may have in carrying out this subtitle." Moreover, as the court of appeals found (Pet. App. A10–A11), the legislative history of the 1956 amendments plainly indicates that Congress had no intent to limit the Commission's authority under *American Trucking*. On the contrary, it was intended that that authority not be disturbed. See S. Rep. No. 1271, 84th Cong., 1st Sess. 5–6 (1955).[5]

2. Petitioners also contend (Pet. 11–13) that the Commission's selection of the Treasury bill rate is arbitrary and capricious and not supported by substantial evidence. The "substantial evidence" test has no application here. The appropriate standard of review was outlined by this Court in *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 749 (1972):

> We do not weigh the evidence introduced before the Commission; we do not inquire into the wisdom of the regulations that the Commission promulgates, and we inquire into the soundness of the reasoning by which the Commission reaches its conclusions only to ascertain that the latter are rationally supported.

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[5] Petitioners also suggest (Pet. 7–8) that since the passage of the Motor Carrier Act of 1980, Pub. L. No. 96–296, 94 Stat. 793 (July 1, 1980), the national transportation policy no longer authorizes the Commission to promulgate the proposed rules. This contention is without foundation. The Motor Carrier Act of 1980 leaves intact the directive that the Commission should administer and enforce the Act to carry out the national transportation policy. 49 U.S.C. (Supp. II) 10101(b). Among the goals set forth

The Commission clearly set forth a rational basis for adopting the Treasury bill rate. In its interim decision the Commission proposed that the interest rate be no less than that paid by commercial banks in the city of the carrier's legal domicile (Pet. App. A15). But several parties objected to that formula because there might be some difficulty deciding what that rate is, given the various rates commercial banks charge and the difficulty of determining a carrier's legal domicile (*ibid.*). In its final decision, the Commission selected the Treasury bill rate to overcome these objections. The Commission also noted the statutory precedent for using the Treasury bill rate in the context of railroad refunds, 49 U.S.C. (Supp. II) 10707(d).[6]

The court of appeals aptly observed that the Commission's decision represents a balance between the benefit of having a uniform, easily determinable rate that will prevent unnecessary disputes in the future and the burden on petitioners of a slightly higher rate (Pet. App. A16). The court correctly applied the standard of review set out in *Allegheny-Ludlum* in refusing "to upset the scales simply because petitioners disagree with their tilt" (*ibid.*).[7]

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in this national transportation policy that the Motor Carrier Act of 1980 retains are "to promote safe, adequate, economical, and efficient transportation" and "to encourage sound economic conditions in transportation." 49 U.S.C. (Supp. II) 10101(a)(2), (3). Petitioners do not contend that the Motor Carrier Act of 1980 eliminates the general rulemaking authority of the Commission.

[6] These refunds are from monies collected under proposed rate increases that are not immediately suspended by the Commission but are ultimately rejected. Clearly, petitioners err in characterizing Section 10707(d) as a "punitive section of the Act" (Pet. 12).

[7] Moreover, the court of appeals correctly observed (Pet. App. A15) that the Treasury bill rate is not intrinsically higher than commercial bank rates. Furthermore, petitioners may avoid any interest obligations by not requiring escrow funds as part of their lease agreements with owner-operators.

3. Petitioners also contend (Pet. 9–11, 13–15) that they were not afforded adequate notice and opportunity to comment on the final interest rate rule and that the Commission's failure to allow them to offer evidence in opposition to the final rule amounts to an unconstitutional taking of their property. These contentions are without merit.

From the very outset of this rulemaking proceeding, petitioners were on notice that the Commission was considering whether to require the payment of interest on escrow accounts. The Commission never suggested that it would restrict its consideration to a particular formula for fixing the interest rate. Even after the Commission's interim decision proposed fixing the interest rate at commercial bank rates, petitioners were on notice that the Commission might not adopt this as its final rule. Petitioners thus were afforded ample opportunity throughout this proceeding to suggest and comment upon various methods of fixing the interest rate. The rule ultimately adopted by the Commission, which was designed to remedy problems pointed out in the comments of the parties with respect to the interim rule (including the addition of a provision allowing an offset for advances), clearly falls within the purpose and scope of the rulemaking as delineated in the notices. Its adoption did not prejudice petitioners in any way.[8] Finally, to require another

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[8] As petitioners note (Pet. 4), they sought review before the Commission of the interest-on-escrow rule, but only of the *interim* rule. They did not request the Commission to reconsider its final rules, which specified the Treasury bill rate. See 49 C.F.R. 1100.97(d). This Court has recognized that "orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts." *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). Petitioners should not now

round of comments simply because changes were made in the interim rules, as petitioners suggest (Pet. 10), would result in an administrative process that would never end. See, *e.g.*, *American Iron and Steel Institute* v. *EPA*, 568 F.2d 284, 293 (3d Cir. 1977); *American Frozen Food Institute* v. *Train*, 539 F.2d 107, 134–135 (D.C. Cir. 1976).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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be permitted to object to the modification of the interim rules when they failed to take advantage of the procedure for making such an objection before the Commission.

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